IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22/04/2003

CORAM

THE HONOURABLE MR. JUSTICE P. SHANMUGAM
and
THE HONOURABLE MR. JUSTICE S.K. KRISHNAN

Habeas Corpus Petition No.2202 of 2002

M. Meera Hussain @ Kalibathulla .. Petitioner

-Vs-

1. State of Tamil Nadu, rep. by
the Secretary to Government,
Public (SC) Department,
Fort St. George,
Chennai-600 009.

2. The Union of India, rep.
by the Secretary to Government,
Ministry of Finance,
Department of Revenue
(COFEPOSA Unit),
Central Economic Intelligence Bureau,
Janpath Bhavan, Janpath,
New Delhi-110 001.

3. The Superintendent of Central Prison,
Central Prison, Chennai-3. .. Respondents

PRAYER : Petition under Article 226 of the Constitution of India seeking to issue a Writ of Habeas Corpus calling for the records relating to the detention order passed by the first respondent in G.O. No.SR.I/1729/6/95, Public (SC) Department dated 8.8.2002 under the provisions of the Conservation Of Foreign Exchange And Prevention Of Smuggling Activities Act, 1974 (Central Act 52 of 1974), set aside the same and consequently direct the respondents to produce the body of the detenu M. Meera Hussain @ Kalibathulla, S/o. Mohamed Abubaker, now detained in the Central Prison, Chennai as COFEPOSA detenu, before this Honourable Court and set him at liberty forthwith.

!For Petitioner : Mr. K.A. Jabbar

^For Respondents : Mr. A. Navaneethakrishnan,
Addl. Public Prosecutor
(for R-1 and R-3).

M/s. Su. Vanathi Srinivasan,
A.C.G.S.C. (for R-2).

:O R D E R

P. SHANMUGAM, J.

Petitioner has challenged the order of detention passed against him on 8.8.2002 under Section 3(1)(i) of the Conservation Of Foreign Exchange And Prevention Of Smuggling Activities Act, 1974 (Central Act 52 of 1974).

2. The brief facts of the case are as follows :-
The detenu was scheduled to leave Madras for Singapore by Singapore Airlines on 18.11.1995. He was intercepted while proceeding for security check on completion of Immigration and Customs formalities and was found in possession of currencies and Travellers Cheques equivalent to Indian Rupees 10,19,250/-. It is stated that the detenu had admitted to smuggle the said currencies out of India by way of concealment in his rectum, in contravention of the provisions of Customs Act, 1962 and also those of the Foreign Exchange Regulation Act, 1973. The detenu is said to have admitted his offence in his statement dated 19.11.1995 stating that he used to go to Singapore frequently to bring foreign goods and sell them at Madras and that he used to conceal foreign currencies in this manner for taking them out of India. After considering other relevant materials and following the procedure, the detenu was arrested on 19.11.1995 at 1400 hours and produced before the Additional Chief Metropolitan Magistrate, E.O.II, Egmore, Madras who remanded him to judicial custody upto 1.12.1995. The detenu had filed a petition on 19.11.1995 stating that he was innocent and that the confession statement given by him was not voluntary, for which a counter has been filed by the respondents. But, however, the detenu was released by the court on 27.11.1995 on conditional bail with a further condition that he should stay at Madras and report before the Customs Department daily on all working days. The bail condition was later relaxed and he was directed to appear before the Customs Department every Monday. On the basis of the materials placed before the State Government, they were satisfied that the detenu was indulging in smuggling goods and that even though adjudication proceedings and prosecution proceedings were likely to be initiated against him under the Customs Act 1962, the State Government was satisfied that in view of the facts set out in the grounds of detention, it was necessary to detain him under the provisions of COFEPOSA with a view to prevent him from indulging in smuggling goods in future.

3. An order of detention was initially passed on 23.1.1996 along with the grounds of detention, but the same could not be served on the detenu and executed and hence, the present order dated 8.8.2002 was passed. In the present order, it is stated that the detenu was released on bail on 27.11.1995 and inspite of diligent efforts, the order of detention dated 23.1.1996 could not be executed since he was absconding all the while. It is further stated that he had subsequently surrendered in the Court of the District Munsif cum Judicial Magistrate, Alandur on 22.7.2002 and the Magistrate remanded him to

judicial custody till 5.8.2002 and further extended the remand till 19.8.2002 and pursuant to the remand, he was lodged in the Central Prison, Chennai as remand prisoner and the present detention order came to be passed on 8.8.2002. The said order is now under challenge.

4. The main submissions of the learned counsel for the petitioner are summarized below :
(i) There is inordinate delay in executing the detention order.
(ii) The delay is not sufficiently explained by a supporting affidavit of the officer concerned.
(iii)No effective steps were taken for cancellation of bail and to find out the whereabouts of the detenu.
(iv) The impugned order, namely the modified order of detention dated 8.8.2002 was passed without the approval of the Honourable Minister as per the detention rules.
(v) The modified detention order did not take into account the important subsequent changes that had taken place in the form of the introduction of a new legislation and the repeal of FERA.
(vi) The prosecution proceedings had already commenced and they were not brought to the notice of the detaining authority.
(vii)There is no nexus between the order of detention and the purpose for which the detenu had been detained and there is no application of mind for considering the imminent possibility of commission of the offence.

5. Learned Additional Public Prosecutor, apart from referring to the detailed counter affidavit, submitted that the detenu had been absconding right from the beginning and hence was notified under Section 7 (1)(b) of COFEPOSA and as the detenu was not found in his alleged address, inspite of the best efforts, the order could not be served on the detenu and submits that a detailed counter affidavit has been filed on behalf of the first respondent in this regard. He submits that the Honourable Minister has signed the detention order and he has also produced the file before us. According to him, the commencement of prosecution proceedings had been taken note of even in the initial order, followed by the grounds of detention and assuming that prosecution proceedings are not taken note of, this would not vitiate the order of detention. According to him, Foreign Exchange Regulation Act and Foreign Exchange Management Act are two independent legislations and though FERA has been repealed, FEMA has saved the orders passed earlier and therefore, the order of detention is sustainable and valid and does not call for any interference.

6. We have heard the counsel for the petitioner and the learned Additional Public Prosecutor, gone through the records and considered the matter carefully.

7. Insofar as the non-execution of the detention order dated 23.1.19 96 is concerned, it is stated that the detenu was on conditional bail, but he subsequently failed to report before the authorities and thereafter, a Non-Bailable Warrant was issued on 27.11.1995. A notification in the Gazette under Section 7(1)(b) has been published on 17.8.1986. A detailed counter affidavit has been filed setting out the steps taken for apprehending the

detenu. The efforts taken by the first respondent and his officers have been set out in paragraphs 6(a) to 6(t), which are extracted hereunder :

"(a) On receipt of the detention order passed by the Government against the detenu. Thiru. Chidambaranathan, the then Deputy Superintendent of Police, District Crime Records Bureau, Ramanathapuram who was incharge of District Special Branch, Ramanathapuram, formed a special party consisting of Thiru Anwarsha, Inspector of Police, Paramakudi Town and Police Constables 1530 and 1588 to execute the order on 30.1 .1996. The party visited Emaneswaram and found that the individual was not residing in the adress given in the order and confidential enquiries revealed that one Thiru Pitchai Kani, brother of the individual was running a rice mill at the address and he denied any knowledge about the individual. On 14.2.96, the special party visited Pudur in Elayangudi Police Station limits, the native place of the individual, but he could not be located. The party after setting up informants at the above villages visited Keelakarai, Ramnad and Sayalgudi on 17 .02.96 and made enquiries.

(b) The Special party visited Chennai on 21.3.1996 and 18.4.1996 and made enquiries at Triplicane, Burma Bazaar and Sowcarpet but no useful information on his whereabouts could be known. The party again visited Paramakudi, Illayankudi and Emaneswaram areas on 20.5.1996, 16.7.1996, 19.09.1996 and met the informants and even then the whereabouts of the individual could not be ascertained. The visit of the party at Paramakudi, Emaneswaram, Kanjakollai and Ilayankudi on 20.10.96, 13.11.96, and 19.12.96 did not yield any useful result o his location.

(c) Again the special team visited Emaneswaram, Paramakudi and Manjoor on 12.02.97, 15.04.97 and 14.06.97 respectively and reliable sources had been planted but even then, no useful information about the movement of the individual could be obtained. The special party again made intensive search on the individual's location at Chennai on 15.0 7.97, 26.09.97, 15.11.97 and also made confidential enquiries at Thousand Lights, Burmah Bazaar, Corontion Nagar and Nethaji Nagar. Even then the individual's location could not be traced.

(d) On 07.02.98, 11.03.98, and 02.04.98, the special party visited Emaneswaram and Pudur and made confidential enquiries through sources. It was ascertained that he did not visit his native place since 199 6.

(e) On 07.05.98, another special party with Special Branch, SubInspector, Thiru Sadhanatham, Head Constable 588, Grade-I, Police Constable 1246 and 1460 was formed and this party visited Paramakudi, Emaneswaram and Ilayangudi on 07.05.98. The enquiries made with the workers of Pitchaigani Rice Mill did not also disclose any useful clue on the whereabouts of the individual.

(f) The special party again visited and made enquiries at Zam Bazazar, Nethaji Nagar, Thousand Light and Coronation Bazaar. Enquiries revealed that the individual was roaming at Burma Bazaar and selling foreign goods. His correct address could not be known despite sustained enquiries made.

(g) The special party again visited Paramakudi, Pudur and Emaneswaram on 06.06.98, 22.06.98, 07.07.98 and 19.07.98 and made confidential enquiries from his brother Thiru Pitchaigani who denied any knowledge on the whereabouts of the individual. The party again visited Chennai on 08.08.98, 10.09.98, 24.09.98, 17.10.98, 28.10.98, 07.11.98 and 20.12.98 and made similar enquiries by meeting the sources at Thousand Lights, Burma Bazaar, Zam Bazaar and Nethaji Nagar and even then the whereabouts of the individual could not be known.

(h) On 01.02.99, the special party visited Emaneswaram and made enquiries and it was ascertained that he was not visiting his native place and that his family members were also not reisding at the address noted in the detention order. The Village Administrative Officer of Emaneswaram Group, Paramakudi Taluk has certified that at present the detenu and his family members are not living in Emaneswaram, Paramakudi Taluk, Ramanathapuram District.

(i) Again the special party visited Keelapallivasal, Kattu Paramakudi, Manjalpattinam, Illayankudi, etc., villages frequently on 11.02.99 , 01.03.99, 17.03.99, 12.04.99 and 26.04.99 and contacted the sources. Similar enquiries were made by the party at Emaneswaram, Gandhinagar, Kumarakuruchi and Elayangudi on 03.05.99, 21.05.99, 07.06.99 and 21.07.99. All these enquiries did not reveal any useful clue on the whereabouts of the individual.

(j) Special Branch, Sub-Inspector, Thiru Perumal and his party was directed on this task and he visited Chennai on 26.09.99 and 27.09.99 and made enquiries with the officials of Customs House, chennai. But no useful clue was forthcoming about his whereabouts. His party also visited Paramakudi, Emaneswaram and Illayangudi on 04.10.99, 18.10.99 and 16.11.99 and continued the enquiries but it was ascertained that he was evading apprehension by the police and absconding elsewhere.

(k) He again visited Elayangudi on 02.12.99, 12.12.99 and 26.12.99 and ascertained that his mother Tmt. Roshan Beevi was residing at door No.12/236, Pallivasal Street, Pudur. During enquiry she also denied of having any kind of contact with the individual. She also informed that he might be in Chennai and the address was not known.

(l) On knowning that the individual had married in Trichy, the special party visited Trichy on 07.01.2000, 13.02.2000 and 26.02.2000 and made enquiries at Khajamalai, Ponmalai, Subramaniapuram and Thiruverumbur. Sustained enquiries with the muslim elders of the above places also did not reveal any useful clue on the whereabouts of the individual.

(m) The special party again visited Trichy on 17.03.2000, 10.04.2000 , 26.04.2000 and 15.05.2000 and continued the enquiries. Similar enquiries made at Burma Bazaar, Chatram bus stand, Thillainagar and Srirangam on 07.06.2000, 17.07.2000, 05.08.2000 and 02.09.2000 about the address of the wife of the individual did not yield any useful result. Reliable sources were set up to inform his arrival to Trichy.

(n) The party again visited Emaneswaram, Illayangudi, Pudur, Manjalpattinam and Nainarkoil areas on 07.10.2000, 27.10.2000, 17.11.2000 and 01.12.2000 and made enquiries with the mill workers who also denied of any knowledge about the location of the individual.

(o) Enquiries were again made at Burma Bazaar, Flower Bazaar, Santhome, Pudupet and Saidapet at Chennai by the special party on 03.01.200 1, 07.02.2001, 18.02.2001, 01.03.2001 and 17.03.2001. Despite sustained enquiries, the individual could not be traced.

(p) Reliable sources had been set up at Emaneswaram and found that the family members were also not residing at the address. This was verified by the special party periodically on 03.04.2001, 18.04.2001, 11.05.2001, 19.05.2001, 10.06.2001, 27.06.2001, 05.07.2001 and 22.07.2001. Physical verification was also made by the special party with the sources planted at Emaneswaram, Pudur, Ela yangudi and Manjalpattinam areas on 05.08.2001, 12.08.2001, 07.09.2001, 23.09.2001, 04.10.20 01, 18.10.2001 and 30.10.2001.

(q) On 08.11.2001 and 10.12.2001, the suspected address 'Ram Nagar, Ice House, Chennai' was verified by the special party and it was ascertained that he was visiting the above address prior to 1996. Reliable sources were also planted to inform his movement at Chennai.

(r) The above address was again verified by the special party on 13.01.2002, 27.02.2002, 17.03.2002 and 28.03.2002. It was ascertained that he did not visit the place but he was under the close contact with an Advocate at Chennai. Sources were planted to ascertain his address at Chennai to facilitate the detention order.

(s) The special party again visited Emaneswaram and Paramakudi and made enquiries with the Muslim elders on 03.04.2002, 22.04.2002 and with the workers of the rice mill at Emaneswaram on 07.05.2002, 16.06.2 002 and 06.07.2002. All the above denied of any knowledge about the whereabouts of the individual.

(t) Finally, during the course of confidential enquiry, it was revealed through sources that the individual surrendered in the court on 2 2.07.2002 and was remanded to judicial custody at the Central Prison, Chennai. Based on the information, Thiru Raju, Sub-Inspector of Police, Thondi Police Station was directed to execute the detention orders on 01.08.2002. He contacted the officials of COFEPOSA Section, Public (SC) Departmetn, Chennai and revised orders in G.O.No.SR.I/1729-6 0/95, dated 08.08.2002 were obtained. Both the orders in G.O.No.SR. I.1729-6/95, dated 23.01.96 and G.O.No.SR.I.1929-60/95, dated 08.08.20 02."

8. We have gone through the file relating to the efforts taken by the police to execute the detention order. We are convinced that there has been consecutive attempts for serving the order and monthly reports filed, and the records reveal that the respondents had been taking diligent steps without any delay and therefore, the petitioner is not correct in saying that no effective steps were taken for execution of the detention order. Inasmuch as

the first respondent, represented by the Joint Secretary to the Government, has filed a counter affidavit and we have seen the report of the Superintendent of Police, Ramanathapuram and the file relating to the steps taken, and we are of the view that there need not be any further supporting affidavit on the part of the authorities who have taken steps for executing the detention order. As a matter of fact, the bail granted to the detenu was cancelled and a non-bailable warrant was issued and it was pending for execution. The submission that the detenu is a permenant resident of Emaneswaram cannot be correct in the light of the Certificate issued by the Tahsildar dated 1.2.1999 to the effect that the detenu is not residing in the address at No.3/138-E, Easwaran Koil Street, Emaneswaram. Therefore, this is a clear case of absconding of the accused and the present order came to be passed while he was remanded after his surrender on 22.7.2002 and remanded to judicial custody.

9. The submission of the learned counsel that the detenu had records to show that he was a Indane Gas consumer and that he had been holding a bank account and that he had taken out L.I.C. Policy showing his residence at Emaneswaram will not in any way mitigate the contention of the respondents. The alleged property bank passbook shows only an entry of Rs.50/- paid on 2.5.1999 and the property tax is said to have been paid by the detenu is in reference to the property belonging to one Resham Beevi. Similarly, taking of Indane Gas connection and the L.I.C. Policy also will not in any way establish that the detenu was available at Emaneswaram all these days, since these documents could have been created or pursued by any third party and not necessarily by the detenu himself. The alleged execution of Power of Attorney by the mother of the detenu in his favour dated 28.12.1999 describing his permanent residence at Emaneswaram for the sale of the property will not mean that the property belongs to him. Obviously, these are all made up for the purpose of the case in order to show as if the detenu had a property at that place.

10. The judgments referred to by the learned counsel for the petitioner in reference to the delay in execution of the detention order are cases where the delay was not properly explained. In T.D. ABDUL REHMAN VS. STATE OF KERALA [A.I.R. 1990 S.C. 225], it was held that when there is unsatisfactory and unexplained delay between the date of order of detention and the date of securing the detenu, such a delay would throw considerable doubt on the genuineness of the subjective satisfaction of the detaining authority leading to a legitimate inference that the detaining authority was not really and genuinely satisfied as to the necessity for detaining the detenu. Their lordships in that case found that the respondents have miserably failed in explaining the delay and the learned counsel appearing for the respondents could not give any reason for the undue delay and in that context, their lordships have referred that the Superintendent of Police cannot file any supporting affidavit explaining the delay in securing the detenu. SMF SULTAN ABDUL KADER VS. JOINT SECRETARY TO GOVERNMENT OF INDIA [1998 S.C.C. (CRI.) 1534] was also a case of delay in execution of the detention order without any explanation. In P.U. IQBAL VS. UNION OF INDIA [1992 (1) S.C.C. 434], the Supreme Court held that the second respondent therein had not offered any satisfactory and proper explanation for the delay

in execution of the detention order. That is the not the case here. We have gone through the file and we find that there is a clear report by the Superintendent of Police and the first respondent had explained in detail, as set out above, the efforts taken by them in securing the detenu. Hence, there is no unreasonable delay.

11. The grounds of the detention order clearly say that the action of the detenu is in contravention of the provisions of the Customs Act, 1962 and also of those under the Foreign Exchange Regulation Act, 1 973. It is stated in paragraph 1(v) as follows :

"Under Section 11(2)(u) of the Customs Act, 1962, read with Section 13(2) of Foreign Exchange Regulation Act, 1973, export of foreign currencies without a valid permit from Reserve Bank of India is prohibited. In the absence of any such permit, the foreign currencies 2000 Malaysian Ringgits and travellers cheques of US Dollars 29,000 recovered from you become liable for confiscation under section 113(d) of Customs Act, 1962 read with section 67 of Foreign Exchange Regulation Act, 1973. By attempting to export the aforesaid foreign currencies without any permit from the Reserve Bank of India and by way of concealment on your person and without declaring to the Customs, thus rendering the same liable for confiscation under Section 113(d) of the Customs Act, 1962, you have also rendered yourself liable for penal action under section 114 and have also committed an offence punishable in a Court of law under section 135 of the Customs Act, 1962."

12. The Foreign Exchange Management Act, 1999 (Act 42 of 1999) repeals the Foreign Exchange Regulation Act, 1973. Sub-section (4) to Section 49 of FEMA says that all offences committed under the repealed Act shall be continued to be governed by the provisions of the repealed Act as if the Act had not been repealed. Sub-section (5) says that notwithstanding any such repeal, any action taken or order issued or declaration made under the repealed Act shall be deemed to have been done or taken under the corresponding provisions of FEMA. Therefore, the submission of the learned counsel for the petitioner that failure to take into account the subsequent enactment vitiates the detention order cannot be sustained.

13. In UNION OF INDIA VS. VENKATESHAN [2002 (3) SUPREME TODAY 421], it has been held that COFEPOSA and FEMA occupy different fields. According to the Supreme Court, while COFEPOSA deals with preventive detention for violation of foreign exchange regulations, FEMA is enacted for the regulation and management of foreign exchange through authorized persons and to provide for penalty for contravention of the said provisions. The Supreme Court thereby upheld the view of the High Court that what was considered to be a criminal violation under FERA ceased to be a criminal violation under FEMA. Therefore, the offence committed by the detenu, namely smuggling of foreign currency outside India, thus violating the provisions of the Customs act, 1962 and the Foreign Exchange Regulation Act, 1973, for which actions had already been initiated, shall continue to be an offence and there is no need for a specific reference to Foreign Exchange Management Act, 1999. It is not the case of the petitioner that the alleged offence committed by him ceased to be an offence. Therefore, the reference to the judgment of the

Supreme Court in BHAWARLAL VS. STATE OF TAMIL NADU [A.I.R. 1979 S.C. 541], that the grounds should indicate a fresh application of mind by the detaining authority to the new situation and the changed circumstances, will not apply to the facts of this case. The detaining authority has, in this case, taken note of the likelihood of initiation of adjudication and prosecution proceedings against the detenu. But, however the Government was satisfied that it was necessary to detain the detenu under the provisions of COFEPOSA with a view to prevent him from indulging in smuggling of goods in future. Therefore, the failure to take note of the alleged reference to the criminal complaint filed in the year 1997 under Sections 132 and 133(1)(a)(ii) of the Customs Act, 1962 before the Judicial Magistrate at Saidapet will not vitiate the order of detention.

14. For all the above reasons, we do not find any ground to interfere with the order of detention. The H.C.P. fails and it is accordingly dismissed.

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To
1. The Secretary to Government,
State of Tamil Nadu,
Public (SC) Department,
Fort St. George,
Chennai-600 009.

2. The Secretary to Government,
Union of India,
Department of Revenue
(COFEPOSA Unit),
Ministry of Finance,
Central Economic Intelligence Bureau,
Janpath Bhavan, Janpath,
New Delhi-110 001.

3. The Superintendent,
Central Prison,
Chennai-3.
(in duplicate for communication to detenu)

4. The Joint Secretary to Government,
State of Tamil Nadu,
Public (Law & Order) Department,
Fort St. George,
Chennai-600 009.

5. The Public Prosecutor,
Chennai-600 104.